ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the Matter of	)	
	)	
GTE Corporation, Transferor	)	
	)	CC Docket No. 98-184
and	)	
	)	
Bell Atlantic Corporation, Transferee	)	
	)	
For Consent to Transfer Control	)	

Comments of Covad Communications Company

Covad Communications Company (Covad) hereby submits its comments in response to the Commission's January 31, 2000, Public Notice seeking comment on two issues related to Bell Atlantic's proposed acquisition of GTE. Specifically, in these comments, Covad addresses: (2) the Applicants' January 27, 2000 supplemental filing, with specific regard to the potential for benefits and harms to various telecommunications markets; and (3) the Applicants' proposed voluntary merger commitments.

Covad is a competitive local exchange carrier that relies on the core market-opening provisions of the Act in order to offer its broadband services to the consumers who demand it. Covad relies on Bell Atlantic, GTE, and other incumbent LECs to meet their obligations under federal law to provide nondiscriminatory access to unbundled network elements (UNEs), collocation space, operations support systems (OSS), and other monopoly network facilities. Covad has extensive experience with the

anticompetitive and discriminatory practices of both Bell Atlantic and GTE, and submits these comments to apprise the Commission of those practices and demonstrate how the proposed merger is woefully inadequate to protect local competitors against the powerful combination of these two maleficent entities. It is Covad's hope that Bell Atlantic and GTE will further supplement their application with a demonstrated commitment to compliance with the law, rather than the milquetoast "commitments" made thus far. As detailed below, Covad's real world experience with what Bell Atlantic and GTE actually do contrasts strongly with what the two companies often promise, and fail, to deliver.[1]

Bell Atlantic and GTE content that their supplemental filing resolves "all issues raised in connection with their proposed merger."[2] In Bell Atlantic and GTE's view of the world, it probably does. Yet with the same arrogance that Bell Atlantic refuses to concede that it is actually purchasing a long distance carrier,[3] Bell Atlantic and GTE both fail to disclose the systematic and calculated pattern of anticompetitive behavior that has defined their treatment of competitive entrants. What Bell Atlantic and GTE must demonstrate to the Commission – which they have entirely failed to do – is how the public interest can withstand the unification of these two incumbent powerhouses.

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[1] *Cf.* Bell Atlantic/GTE Joint Reply Comments at 2 n.1 ("Other opponents, including Covad . . . filed comments that are more rhetorical than substantive.") Such was the entire extent of the applicants' response to Covad's comments, as Bell Atlantic/GTE chose to devote more time to waging its own rhetorical war against AT&T's cable mergers than addressing issues raised by other commenters.

[2] BA/GTE Supplemental Filing at 1.

[3] As Covad and other commenters have demonstrated, there can be no argument that Bell Atlantic is purchasing, and retaining control of, the long distance assets of GTE. As a practical matter, if that were not the case, Bell Atlantic would rationally divest itself of GTE's long distance assets and bring the year-old battle to secure approval of this merger to an end.

The Combination of Bell Atlantic and GTE, like the combination of SBC and Ameritech, will harm competition in the local market

The Commission should start with the presumption – as it did in the context of the SBC/Ameritech merger – that the combination of Bell Atlantic and GTE will cause substantial harm to the public interest. Helpfully, Bell Atlantic and GTE, in their supplemental filing, provide a "test" for the Commission to use in determining if the proposed merger will harm competitive LECs seeking to offer service in the combined entity's territory.

In the SBC/Ameritech merger, the Commission concluded that that combined entity's incentive to discriminate against competitive LECs would *increase* after the merger because the merged firm would "capture more of the benefits (than either firm would alone) of any discriminatory acts that raise CLEC costs of doing business even outside one of the merging company's service areas."[4] As Bell Atlantic and GTE note in their supplemental filing, this theory "depends critically on two premises: (1) that the same CLECs will enter both of the merging companies' territories; and (2) that those CLECs will have costs that are common to the several areas at issue."[5] Covad alone satisfies both of these prongs, thus establishing the harm to competition that will result from the combination of these two powerful monopolists.

As to (1), Covad is an active entrant throughout both Bell Atlantic and GTE territories: in both Washington, D.C., and Los Angeles, for example, Covad has a more widespread xDSL service offering that either Bell Atlantic or GTE, respectively. Thus, while Bell Atlantic and GTE assert that a CLEC is "unlikely to be sharing many, if any

[4] BA/GTE Supplemental Filing at 17.

Northeast-region costs with any operations in Los Angeles, Seattle, Dallas, and Tampa,"[6] the merging entities are letting their monopolist incumbent biases show through – they simply cannot conceive of any company offering service anywhere it doesn't have an entrenched presence. Covad is offering its pro-consumer broadband services throughout the Northeast *and* in Los Angeles *and* in Seattle *and* in Dallas *and* in Tampa.

As to (2), to costs of offering service throughout Bell Atlantic and GTE territories are closely linked. For example, Covad tries to use a unified internal OSS system (to the extent permitted by ILEC OSS) and unified network services and equipment, and thus the costs that Covad incurs to enter and offer service in a particular market are "common" across ILEC regions. For example, Covad must build its OSS back office systems and interfaces to match the ILEC's systems.[7] In addition, excessive costs – from inflated collocation, loop conditioning, and OSS charges – and discriminatory delays – from delayed implementation of line sharing and sub-loop unbundling to year-long collocation provisioning intervals – are rampant in both Bell Atlantic and GTE territories. The costs of fighting these barriers to entry are the same in Los Angeles as they are in New York. As a new entrant throughout both territories, Covad will suffer exactly the anticompetitive harm from the combination of Bell Atlantic and GTE that the Commission sought to prevent by imposing conditions on the combination of SBC and Ameritech. Regardless of whether Bell Atlantic and GTE are correct in asserting that "[t]he theory does not apply when a CLEC in one merger partner's service area is not entering at all in the other's areas," the theory clearly *does* apply in the case of the harm

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[5] BA/GTE Supplemental Filing at 17.
[6] BA/GTE Supplemental Filing at 18.

Covad, as an entrant throughout both merger parties' territories, would suffer as a result of this merger. Thus Bell Atlantic and GTE concede, and Covad agrees, that the instant merger would cause serious harm to local competition that, if permitted to proceed unchecked, would undermine the market-opening provisions of the 1996 Act and deal a severe blow to consumer welfare.

It is Covad's strong belief that Bell Atlantic's attempt to purchase a long distance company before it has the requisite section 271 approvals is reason enough to deny the instant applications. Should the Commission disagree, Covad respectfully submits that the harm to local competition that would result from the combination of these two entities is sufficient independent grounds for denial of the applications. Covad details below, however, certain measures the Commission could take to mitigate the competitive harms of this combination should it decide to approve Bell Atlantic and GTE's applications.

Bell Atlantic/GTE Self-Selected "Conditions" Are Inadequate and Must Be Strengthened

In order to ameliorate the anticompetitive effects of their combination, Bell Atlantic and GTE have selected those provisions of the SBC/Ameritech merger conditions that they feel they can live with. In reviewing the merging parties' proposed edits to those merger conditions, the Commission should be mindful that Bell Atlantic and GTE may not have been motivated by their desire to foster competition in choosing which conditions interested them. In the proceeding pages, Covad undertakes a line by line analysis of Bell Atlantic and GTE's February 1, 2000, *ex parte* which shows the

[7] As detailed in Bell Atlantic and GTE's supplemental filing, the combined company will maintain its practice of keeping competitors' costs as high as possible by refusing to implement a uniform OSS system in the merged entity's region. See BA/GTE Supplemental Filing at 22.

differences between the merging parties' proposed conditions, and the conditions imposed by the Commission in the SBC/Ameritech merger order.[8]

A. Introduction to Conditions

In the second paragraph of the introduction to the conditions, BA/GTE adds language to reflect that the commitments it makes do not "limit in any way the legal rights of Bell Atlantic/GTE with respect" to sections 251, 252, 271, or 272 of the Act.[9] This language provides BA/GTE the means to argue, in the context of an interconnection arbitration, subsequent rulemaking, or judicial proceeding, that the merger commitments it made are superceded by the Act, and thus any conflict must be resolved in favor of BA/GTE's obligations under the Act and not the merger conditions. BA/GTE cannot be permitted to limit the effectiveness of the commitments it makes in such a manner.

In the fourth paragraph of the BA/GTE ex parte, Bell Atlantic and GTE purport to constrict the definition of "Bell Atlantic/GTE" by adding the language "any successor or assign of such company that provides wireline telephone exchange service and that is an affiliate of Bell Atlantic/GTE." As evidenced by the merging parties' explanation of how it would not "own" GTE's long distance assets, Bell Atlantic plays fast and loose with terms like "affiliate."[10] BA/GTE do not define which definition of "affiliate" they would use to escape the merger conditions at a later date by structuring operations as to avoid "affiliate" status. The proposed added language should be eliminated and the SBC/Ameritech language should stand.

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[8] Letter dates Feb. 1, 2000, from Suzanne Yelen, Wiley, Rein and Fielding, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-184 (BA/GTE Feb. 1 ex parte).
[9] BA/GTE Feb. 1 ex parte at D-1.
[10] The definition of "affiliate" in section 153 of the Act is broad enough to permit BA/GTE to engage in the same games in the future that it is playing now with its merger application.

A. Separate Affiliate

1. "True" Separation

Covad has long supported structural separation of the wholesale and retail operations of incumbent LECs as the best means of addressing the fundamental discrimination inherent in incumbent operations. Incumbent LECs have the incentive and ability to advantage their own retail operations by providing poor wholesale service to their competitors. Covad experiences this rampant discrimination every day, in the form of long collocation intervals and high prices, poor loop delivery and excessive conditioning charges, litigation and regulatory delay, and treatment that no "customer" in a competitive business would ever suffer if there were any other option. The only real means of bringing an end to this pattern is to fully separate the wholesale and retail operations of the incumbent. Only through true separation will the incumbent lose the incentive to unfairly advantage its retail operations.

Covad's vision of structural separation is not the fully integrated version of "separation lite" that Bell Atlantic volunteers to adopt. Properly constructed, divestiture of retail and wholesale operations can be an effective means of addressing discriminatory practices, and the FCC should require it of Bell Atlantic and GTE. Indeed, the FCC concluded as much in the *First Advanced Services Order and NPRM*. In what it termed an "optional alternative pathway," the Commission outlined a truly structurally separate entity that would operate "on the same footing as any of their competitors."[11] In order for that affiliate to be "truly separate," the Commission determined that it must satisfy

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[11] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 at ¶¶ 83, 86 (rel. Aug. 7, 1999).

"adequate structural separation requirements" and acquire "facilities used to provide advanced services" on its own.[12] If it failed to satisfy these requirements, the Commission concluded, the affiliate should be treated no differently than the incumbent LEC itself.

The Commission outlined the specific parameters that an incumbent LEC separate affiliate must meet in order to be deemed a truly separate affiliate.

(1) The incumbent must "operate independently from its affiliate." The incumbent and affiliate may not "jointly own switching facilities or . . . land and buildings . . . ." In addition, the incumbent may not "perform operating, installation, or maintenance functions for the affiliate."[13]
(2) Affiliate/incumbent transactions must be "on an arm's length basis, reduced to writing, and made available for public inspection."[14]
(3) Incumbent and parent must maintain separate books, records, and accounts.
(4) Incumbent and parent must have separate officers, directors, and employees.
(5) Upon credit default by the affiliate, no recourse may be had to the assets of the incumbent.
(6) The incumbent LEC, may not discriminate in favor of its affiliate in the provision of any goods, services, facilities, information, or the establishment of standards.
(7) The affiliate must interconnect with the incumbent pursuant to tariff or interconnection agreement, and any UNEs, facilities, interfaces, and systems provided to the affiliate must be provided to any unaffiliated entity.

The SBC/Ameritech affiliate does not satisfy a majority of these parameters. Moreover, in the instant proceeding, Bell Atlantic and GTE have agreed to abide by some, but not all, of the parameters of the SBC/Ameritech separate affiliate and only for a limited time period. The SBC/Ameritech affiliate, with numerous of its safeguards removed by Bell Atlantic's "caveats," offers little or no protection against the type of

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12 *First Advanced Services Order and NPRM* at ¶ 92.

13 *First Advanced Services Order and NPRM* at ¶ 96.

14 *First Advanced Services Order and NPRM* at ¶ 96.

discrimination that Covad has suffered in the Bell Atlantic and GTE territories. Few, if any, of these matters are addressed by the provisions of the SBC/Ameritech affiliate that Bell Atlantic and GTE have agreed to meet. In short, the model of separation advanced by Bell Atlantic and GTE is an inappropriate model for the Commission to use to protect the public interest.

To truly serve the worthy goal of ensuring nondiscrimination, the structurally separate entity must be legally separate—no common officers, employees, personnel, facilities, finances, or other assets. To ensure true separation, the Retail Entity cannot be the sole shareholder of the Wholesale Entity (or vice versa). Otherwise, every transaction would simply be an internal accounting transfer not subject to true nondiscrimination. Moreover, if management is compensated by stock options, as is commonplace in the private sector, then management would have incentive to direct or condone any anticompetitive behavior that would increase the value of the combined entity's stock. As a result, nothing short of divestiture—separate ownership—of the wholesale and retail arms would serve to promote the public interest. The creation of a true wholesale "carrier's carrier" with dominion over the local plant and central office assets (but no role or interest in *any* retail service provision) would provide substantial public interest benefits and would certainly serve to "free" the BOC retail company from ILEC status, and perhaps even from the Section 271 interLATA restrictions.

There is ample market precedent for this construct. For example—

- Faced with a similar "competitor as customer" concern, AT&T successfully spun off Lucent Technologies. AT&T is now in the process of creating a separate "tracking stock" for its mobile wireless business.

- Intelsat engages exclusively in the provision of wholesale satellite transport services. New satellites and services are funded by securitization of long-term contractual commitments by its customers.
- The Trans-Alaska Pipeline System is jointly owned by major oil companies and is operated in a nondiscriminatory manner by a wholesale operating company that has no retail or exploration interests.

Further, Bell Atlantic and GTE's "separation lite" proposal offers absolutely no assurance that competitive LECs will get true nondiscriminatory treatment from the wholesale entity. As is clear on the record in this proceeding, Bell Atlantic and GTE's version of parity would allow competitive LECs to provide no more or better advanced services than its retail entity.[15] In the merging parties' view, bad parity is parity nonetheless. Any divestiture ordered by the Commission would have to ensure that competitive LECs are afforded of parity of opportunity to provide whatever services consumers want and need.

The Commission should also be wary of Bell Atlantic's new-found commitment to the principle of structural separation. It is noteworthy that until December 10, 1999, Bell Atlantic had been an adamant opponent of structural separation, filing opposing

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[15] For example, in response to an investigation into Bell Atlantic's discriminatory practices against competitive broadband service providers commenced by the U.S. House of Representatives Committee on Commerce, Bell Atlantic noted the following: (a) "Bell Atlantic offers only asynchronous DSL, ADSL, to its retail customers" and (b) ". . . Bell Atlantic will not provide its own ADSL service to retail customers who are served by loops that are longer than 12,000 feet." *See* Letter dated Dec. 2, 1999, from Thomas J. Tauke, Senior Vice President-Government Relations, Bell Atlantic, to The Honorable Tom Bliley, Chairman, Committee on Commerce, U.S. House of Representatives, at 1. Covad, on the other hand, offers a wide range of DSL products – ADSL, HDSL, IDSL, for example – over loops tens of thousands of feet in length. Bell Atlantic's separate affiliate, which it contends would offer parity of performance to CLECs, would actually serve to bring down Covad's offerings to Bell Atlantic's level. The affiliate as proposed by Bell Atlantic would thus have the perverse effect of making Bell Atlantic's retail ADSL offering the standard by which its performance is judged, despite the fact that Bell Atlantic's retail service is significantly narrower than Covad's offerings.

comments to the Commission's August 1998 notice into such separation, and filing no fewer than two legal challenges to the recent Pennsylvania Public Utility Commission Order that Bell Atlantic structurally separate its retail and wholesale operations.[16]

2. "False" Separation

Bell Atlantic and GTE have agreed to abide by only the bare minimum of separation parameters from the SBC/Ameritech merger conditions – they refuse even to sign on to the most procompetitive of those conditions. As to the separate affiliate, Bell Atlantic and GTE immediately give themselves two "outs" from the limited parameters they are willing to endure. First, in the very first paragraph of the separate affiliate section, the parties grant themselves the option to offer advanced services either through a separate affiliate pursuant to the merger conditions "or as set forth in 47 U.S.C. § 272."[17] The Commission should not permit Bell Atlantic and GTE to select the regulatory scheme they choose to abide by. Second, the parties attempt to make the merger conditions subservient to state certification, adding language that makes the affiliate effective only if the parties obtain state certification "that does not materially change the Conditions specified herein."[18] To the extent that the conditions impose more stringent procompetitive requirements on the merged entity's affiliate, the conditions

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[16] *See, e.g. Application for Extraordinary Relief of Bell Atlantic* (Penn. Supr. Ct., dated Oct. 21, 1999) ("the PUC announced that it will break Bell Atlantic into two separate corporations even though the PUC has no legal authority to require this draconian corporate dismemberment. . . . The PUC is plainly an agency run amok . . . . Unless reversed, the September 30 Order will financially devastate Bell Atlantic . . . and have severe consequences for the millions of employees, businesses, and consumers across Pennsylvania who depend on Bell Atlantic and the telephone services it provides.") Will the real Bell Atlantic please stand up?

[17] BA/GTE Supplemental Filing at D-3. *See also* Filing at D-6, D-7.

[18] BA/GTE Supplemental Filing at D-3.

should supercede the parameters of any state certification obtained by the separate affiliate.

In subsection a., the parties attempt to preclude the Commission from finding that the separate affiliate is a successor or assign of the incumbent LEC by forcing the Commission to conclude now that the parties can jointly market service "without the Advanced Services Affiliate being deemed a successor or assign of a BOC or incumbent LEC for purposes of 47 U.S.C. §§ 153(4) or 251(h)."[19] The Commission should not, and indeed cannot, adjudicate the application of those statutory provisions in advance of the actual operation of the affiliate and an examination of its marketing and other behaviors.

Bell Atlantic and GTE seek to limit the provision of the SBC/Ameritech merger conditions that required SBC/Ameritech to use the EDI OSS interface between the incumbent LEC and its affiliate. Bell Atlantic and GTE, already advocating that they be permitted to adopt different OSS in different parts of the merged company's territories, now seek to change that requirement to use only "interfaces available to CLECs" rather than EDI.[20] EDI is of vital importance to competitive LECs who seek and electronic interface with Bell Atlantic and GTE, rather than the manual processes in place today. Bell Atlantic and GTE should be required to use EDI – otherwise, it has no incentive to implement electronic interfaces. Because the affiliate will be able to share employees, certain equipment, and real estate with the incumbent LEC, they will not need to use electronic interfaces to order service in the same way competitive LECs rely on such interfaces.

[19] BA/GTE Supplemental Filing at D-4.
[20] BA/GTE Supplemental Filing at D-23.

On the subject of OSS, Bell Atlantic and GTE have one simple change to the procompetitive OSS obligations in the SBC/Ameritech merger: "Text deleted."[21] And as to the procompetitive loop information provisions, of vital importance to competitive LECs? "Text deleted."[22] In the SBC/Ameritech merger, the Commission concluded that requiring the combined SBC/Ameritech to implement a common electronic interface to be used by competitive LECs and the SBC/Ameritech affiliate would lower competitors' costs of providing advanced services. SBC/Ameritech was ordered, in advance of industry standards, to deploy OSS that permitted electronic access to pre-order xDSL loop information and other advanced services features.[23] SBC/Ameritech was also required to provide OSS discounts of 25% recurring and nonrecurring charges in order to incent the company to update its OSS rapidly.[24]

Bell Atlantic and GTE recognize, as the Commission did in the SBC/Ameritech merger order, that the incumbent LEC maintains a huge advantage over competitors if it denies them electronic OSS access. The Commission sought to eliminate that advantage, and to end years of incumbent slow-rolling in deployment of electronic interfaces, by requiring SBC/Ameritech to implement EDI. Bell Atlantic and GTE have been typical among incumbents in slow-rolling OSS access – and their latest gambit is to ensure that competitors are forced to build two entirely different OSS systems to deal with one company. The Commission should impose the same OSS requirements on Bell Atlantic and GTE as in the SBC/Ameritech order, and ensure those requirements are applied by the merged entity across its entire territory, not simply where it chooses.

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[21] BA/GTE Supplemental Filing at D-26.
[22] BA/GTE Supplemental Filing at D-26.
[23] SBC/Ameritech Merger Order at Appendix C, p. 25.
[24] *Id.* at 28.

In their "subtractions" from the SBC/Ameritech merger conditions, Bell Atlantic and GTE have taken great pains to avoid any binding timelines or procedures for their OSS deployment. They commit only to "develop a plan" for OSS deployment within 30 days of the merger closing date, thus neatly avoiding the tight and definite deadlines imposed by the FCC on SBC/Ameritech for actual deployment of functional OSS, rather than just a "plan."[25] In addition, Bell Atlantic and GTE give themselves the option to deploy a web graphical user interface (GUI), rather than an electronic interface like EDI (Bell Atlantic today deploys a GUI, rather than a true electronic interface, for certain pre-ordering transactions).[26] In the SBC/Ameritech merger, the Commission spelled out in great detail the type of interface the incumbent had to provide, as well as the timeline it had to follow in implementing the interface. Bell Atlantic and GTE should have the same obligation to ensure that the Commission, not the incumbents, is in control of the pace of competition.

Bell Atlantic and GTE also should not be permitted to push off the obligation to implement OSS changes to "24 months after the completion of the collaborative process" in the Bell Atlantic and GTE territories.[27] Because those collaboratives are still underway, with much work to be done, Bell Atlantic and GTE are effectively insuring that competitors will have to wait much more than two more years -- well beyond *six years* after the passage of the Act -- before they can begin to enjoy true electronic access to Bell Atlantic and GTE OSS.

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[25] BA/GTE Supplemental Filing at D-29.
[26] BA/GTE Supplemental Filing at D-29.
[27] BA/GTE Supplemental Filing at D-33.

Loop information

Access to loop information is vital to competitive DSL providers. Bell Atlantic and GTE know that, because they need the information too in order to market their advanced services. Of course, they have the information, and they don't want to give it up. For example, in the New York DSL Collaborative, Bell Atlantic has refused for months to give competitive LECs access to the LFACS loop plant data base. In fact, until instructed to do so by NY Commission staff, Bell Atlantic refused to even divulge what information was available in LFACS. This is not a company interested in assisting its wholesale customers in finding out information about loops. In the instant matter, the Commission must not let the merging parties escape the crucial loop information requirements of the SBC/Ameritech conditions. Without access to the following vital information about loops, competitors cannot market service or sign up customers:

1. Loop length, by segment and gauge
2. Quantity, location of load coils
3. Quantity, location and length of bridged taps
4. Quantity, type and location of repeaters
5. Quantity and location of Low pass filters
6. Quantity and location of Range extenders
7. Quantity, type and location of pair gain/DLC
8. Qualification status of the loop based on specified PSD.
9. Source of data – actual or designed
10. Presence of DAML
11. Presence of disturbers in same or adjacent binder groups
12. Whether the loop originates at a Remote Switching Unit (RSU); location and type
13. Type of Plant (aerial or buried)
14. Loop Medium (type of loop copper or fiber)
15. Availability of spare facilities
16. Resistance Zone
17. Origin of data contained in each element (manual or electronic database)

This is all information that Bell Atlantic and GTE possess as to their loop plant, in one form or another, and it is information they use to determine what services they can

market to their customers.[28] Competitive LECs are entitled to the same information, and the loop information provisions of the SBC/Ameritech merger are a vital means – even beyond the UNE Remand rules, which are not specific enough in their requirements -- of ensuring that access.

Carrier-to-Carrier Performance Plan

Bell Atlantic and GTE also make numerous amendments to the carrier-to-carrier (C2C) performance plan adopted by the Commission. First, Bell Atlantic seeking to eliminate the plan entirely in New York before it even goes into effect by ensuring that the plan sunsets "on a state by state basis" as soon as Bell Atlantic has section 271 authority in a state.[29] The Commission should not permit Bell Atlantic to keep New York out of these protective conditions. In addition, Bell Atlantic and GTE seek to limit the C2C when "a state commission" adopts a performance plan.[30] Because state commissions adopt widely disparate regulatory regimes, the FCC's performance plan should not "disappear" merely because a state adopts a performance plan: the stronger and more procompetitive of the plans should control.

The same theory applies for monetary penalties. Bell Atlantic and GTE seek the right to "offset any payments due" to the U.S. Treasury if they are also penalized by a state or in litigation "as a result of the same conduct."[31] The deterrent effect is strongest if the merged parties are subject to real monetary penalties, rather than if Bell Atlantic and GTE can select the jurisdiction it wants to pay. The FCC, the state commissions, and

[28] In the NY Collaborative, Bell Atlantic frequently complains that it doesn't have all of the above-list of information as to all its loops. Covad will gladly take whatever information Bell Atlantic has. Any information on any loops would be more than Covad gets today.
[29] BA/GTE Supplemental Filing at D-28.
[30] BA/GTE Supplemental Filing at D-28.
[31] BA/GTE Supplemental Filing at D-35.

the courts all act as an effective check on Bell Atlantic and GTE's incentive to violate its merger conditions, and those important checks should not be weakened in this manner.

As to in-region agreements, Bell Atlantic and GTE seek to limit "voluntarily negotiated" or "agreed to" interconnection arrangements or UNEs to only the pre-merger area.[32] This is a modification to the SBC/Ameritech merger conditions, because no such language was there before. Thus, Bell Atlantic seeks to pretend that, in the post-merger world, it is not a bound as a single company to commitments it made as separate companies. This is the height of anticompetitive behavior. Bell Atlantic and GTE should continue to be bound by commitments made in the pre-merger world, and should be further explicitly bound to make those commitments available throughout its post-merger territory. Commitments do not simply disappear merely because Bell Atlantic and GTE decide to merge. As a general principle, Bell Atlantic and GTE should be bound by the best agreement they have struck with a competitor, anywhere in their territory – they should not be permitted to play "hide the bargain" as they are attempting to do here.[33]

In addition, Bell Atlantic and GTE add language seeking to avoid having to provide competitors with "any interconnection arrangements or UNEs that incorporate a determination reached in an arbitration [pursuant to section 252]. . . or the results of negotiations with a state commission or telecommunications carrier outside of . . . section 252(a)(1)."[34] Again, Bell Atlantic and GTE seek through this new language to severely limit the effectiveness of the requirement that they make procompetitive arrangements available to competitors throughout their region. And to top it off, disputes over the

[32] BA/GTE Supplemental Filing at D-45.

[33] The parties' explanation that this is a "true merger of equals and not an outright acquisition" as in the case of SBC/Ameritech is nonsensical. BA/GTE Supplemental Filing at 27. If Bell Atlantic doesn't want to be bound by agreements entered into by GTE, it doesn't have to merge with GTE.

availability of these interconnection arrangements or UNEs are to be handled, according to the merging parties' modifications, "pursuant to negotiation between the parties or . . . under 47 U.S.C. § 252."[35] This ensures that delay of at least a year awaits any competitor seeking to take advantage of this merger condition. The Commission should provide a faster, more efficient means than "negotiation" – a long road to nowhere – for competitive LECs to secure access to this condition.

One of the most procompetitive provisions of the SBC/Ameritech merger conditions was the unbundled loop discount, which protected competitors against the discriminatory might of the combined entities by affording them a UNE loop discount. Because the Commission concluded that a combined SBC and Ameritech would harm the public interest by spreading their local monopoly to the detriment of competition, the loop discount was a necessary condition. Bell Atlantic's views on this procompetitive measure are clear in its "edited" version of the SBC/Ameritech conditions: "Text deleted."[36] Again, the Commission should not permit Bell Atlantic and GTE to escape the application of the most competition-friendly aspects of the SBC/Ameritech merger conditions in favor of only those conditions that they consider palatable. The UNE loop discount provides a vital incentive for the merged parties to open their markets fully to competition. In the Bell Atlantic region, that requirement could sunset, as it did with SBC/Ameritech, with section 271 authorization. In the GTE region, it could sunset in a definite period of time, such as the 24 months from closing benchmark used in the SBC/Ameritech merger order.

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[34] BA/GTE Supplemental Filing at D-47.
[35] BA/GTE Supplemental Filing at D-47.
[36] BA/GTE Supplemental Filing at D-47.

Finally, the requirement that SBC/Ameritech identify procedures and costs to provide competitors with access to cabling in multi-unit properties was vital to competition. Bell Atlantic and GTE have removed all of the portions of that requirement that made it timely, widespread, and effective.[37] Bell Atlantic and GTE should be required to subscribe to the same widespread testing and timeline deployments as in the original SBC/Ameritech order.

Conclusion

As demonstrated by Covad in its February 15, 2000, comments on the "divestiture" proposal of Bell Atlantic and GTE, the Commission must deny the application of Bell Atlantic and GTE, because Bell Atlantic is attempting to purchase a long distance provider in direct violation of section 271 of the Act. To the extent that the Commission concludes that Bell Atlantic is not really merging with a long distance provider, Covad submits that the Commission should ensure that competitors seeking to provide service in Bell Atlantic and GTE's regions are not harmed by the merger of these two large monopolists. Covad urges the Commission to examine closely the "commitments" made by the merging parties and protect competition by imposing the conditions that serve the public interest, not Bell Atlantic and GTE's business plans.

Respectfully submitted,

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[37] BA/GTE Supplemental Filing at D-49.

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March 1, 2000